Supreme Court, U.S.
FILED

(1)

06153 2 MAY 17 2007

No.

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID R. BULLOCK, PETITIONER

v.

STATE OF MISSOURI

PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, SOUTHERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

SUSAN K. ROACH
Counsel of Record

The Plaza in Clayton
190 Carondelet Plaza,
Suite 1500
Clayton, Missouri 63105
(314) 434-7272
Facsimile: (314) 863-6653
E Mail: SRoachlaw@aol.com

Attorney for Petitioner

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 393-4141 ♦ USSCINFO.COM

QUESTION PRESENTED

1. Whether a Missouri trial court exceeds it's jurisdiction in sentencing a defendant to a period of incarceration for the charge of Attempted Statutory Rape in the First Degree when at the time of the alleged offense the state statute contained no provision regarding punishment for Attempted Statutory Rape in the First Degree so that at the time of the conviction and sentencing there did not exist any punishment for the crime of Attempted Statutory Rape in the First Degree.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 3

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 9

APPENDIX

State Supreme Court Order 1a

State Court of Appeals Order 2a

State Circuit Court Findings of Fact & Conclusions of Law 14a

Relevant Provisions Involved 18a

TABLE OF AUTHORITIES

Page

CASES

INTEREST OF K.K.M., 647 S.W. 2D 886, 888 (MO.APP.1983) 8

MERRIWEATHER V. GRANDISON, 904 S.W.2D 485, 486 (MO. APP. W.D. 1993) 8

STATE V. BULLOCK, 153 S.W.3D 882 (MO. APP. S.D. 2005) 2

STATE V. PRELL, 35 S.W.3D 447 MO. APP. W.D. 2000 8

STATUTES

28 U.S.C. §1254 2

R.S. Mo. §556.026 ..... 2, 9

R.S. Mo. §564.011 ..... 2, 3, 5

R.S.Mo. §566.032 ..... *passim*

OPINIONS BELOW

The ruling of the Missouri Supreme Court dated February 27, 2007 denying transfer of the Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence to the Missouri Supreme Court is officially reported at 213 S.W.3d 142 (Mo. App. S.D. 2006 and is reproduced at App. A at page 1a

The ruling of the Missouri Court of Appeals, Southern District of Missouri dated January 10, 2007 denying rehearing and transfer of the Petitioner's Motion to Vacate, Set Aside or Correct the Judgment or Sentence to the Missouri Supreme Court is officially reported at 213 S.W.3d 142 (Mo. App. S.D. 2006 and is reproduced at App. B at page 2a

The decision and order of the Missouri Court of Appeals, Southern District of Missouri denying Petitioner's appeal of the trial court's judgment denying Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence (on the issue of jurisdiction) dated December 20, 2006 is reported at 213 S.W.3d 142 (Mo. App. S.D. 2006, and is reproduced at App. C at page 3a-13a

The decision of the Circuit Court of the County of Jasper, State of Missouri denying Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence dated January 11, 2006 is reproduced at App. D at page 14a-17a

JURISDICTION

The Petitioner was convicted of attempted statutory rape and attempted sexual exploitation of a minor. On January 26, 2005 the Missouri Court of Appeals, Southern District affirmed the convictions and denied Petitioner's direct appeal. See *State v. Bullock*, 153 S.W.3d 882 (Mo. App. S.D. 2005). Petitioner filed a Motion to Vacate, Set Aside or Correct the Judgement or Sentence. The Circuit Court of the County of Jasper, State of Missouri denied Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence on January 11, 2006.(p. 14a-17a). The Missouri Court of Appeals, Southern District of Missouri denied Petitioner's appeal of the circuit court's judgment denying Petitioner's Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence on December 20, 2006 (p. 3a-13a). The Missouri Court of Appeals, Southern District of Missouri denied rehearing and transfer of the Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence to the Missouri Supreme Court on January 10, 2007 (p. 2a). The Missouri Supreme Court denied transfer of the Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence to the Missouri Supreme Court on February 27, 2007 (p. 1a). This court has jurisdiction to review the order of the Missouri Supreme Court pursuant to 28 U.S.C. §1254 and Rule 13 of the U.S. Supreme Court Rules.

RELEVANT PROVISION INVOLVED

The relevant statutory provisions are **R.S. Mo. §564.011; R.S. Mo. §556.026 ; R.S.Mo. §566.032**

STATEMENT

The Petitioner seeks review of the ruling of the Missouri Supreme Court denying transfer of Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence which had originally been filed in the Circuit Court of Jasper County, Missouri. The Circuit Court denied Petitioner's Motion. Petitioner appealed to the Missouri Court of Appeals Southern District which denied the appeal. Petitioner raised the jurisdictional issue on the direct appeal to the Missouri Court of Appeals, Southern District. Petitioner filed a Motion for Rehearing and for Transfer to The Missouri Supreme Court by the Court of Appeals which was denied and then filed a Motion in the Missouri Supreme Court for transfer to the Missouri Supreme Court which was also denied. The aspect of the above denials on which Petitioner seeks a writ of certiorari is that Petitioner asserts that the Missouri circuit court (trial court) exceeded it's jurisdiction in sentencing the Petitioner to a period of incarceration for the charge of Attempted Statutory Rape in the First Degree when at the time of the alleged offense the Missouri state statute, **R.S. Mo. §564.011**, contained no provision regarding punishment for Attempted Statutory Rape so that at the time of the conviction and sentencing there did not exist any punishment for the crime of Attempted Statutory Rape. Additionally, the Missouri Court of Appeals and the Missouri Supreme Court, in effect, held that the Petitioner could not attack the jurisdiction of the Circuit Court to sentence the Petitioner because at sentencing Petitioner's trial counsel did not raise an objection based on jurisdiction and Petitioner did not raise the jurisdictional argument

in his original Motion to Vacate, Set Aside or Correct the Judgement or Sentence.

At the time of sentencing and at the time of the filing of Petitioner's Motion to Vacate, Set Aside or Correct the Judgement or Sentence the Missouri legislature had not amended or revised **R.S. Mo §566.032** to include a punishment for attempted statutory rape. The Missouri legislature subsequently recognized that attempted statutory rape in the first degree was not a recognized offense and both the Missouri House of Representatives and the Missouri Senate introduced bills that would designate attempted statutory rape in the first degree as an offense. **HB 1698** created the crimes of attempting to commit statutory rape in the first degree and attempting to commit statutory sodomy in the first degree". Summary of Introduced Bill HB 1698– Sexual Offenders. Similarly, **SB 588** proposed that **RSMo. §566.032** be amended to include, "This section makes the penalty for attempt to commit statutory rape in the first degree a felony with an authorized term of imprisonment of not less than 5 years, unless certain aggravating circumstances exist, in which case, the term of imprisonment shall not be less than 10 years. This penalty is the same as the current penalty for committing statutory rape." On June 5, 2006 the Missouri legislature amended **R.S. Mo. §566.032** to include "attempt to commit statutory rape in the first degree."

The Missouri Court of Appeals, Southern District remanded the appeal back to the Circuit Court on two other issues for further findings. The Circuit

Court made those findings and Petitioner has appealed that remand judgment by the Circuit Court to the Missouri Court of Appeals, Southern District. That appeal does not incorporate the jurisdictional issue addressed in this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. The Missouri trial court exceeded it's jurisdiction in sentencing the Petitioner to a period of incarceration for the charge of Attempted Statutory Rape in the First Degree since at the time of the alleged offense the Missouri state statute, **R.S. Mo. §566.032**, did not make attempted statutory rape an offense and **R.S. Mo. §564.011** prescribed no punishment for an unclassified felony.

Movant Bullock was convicted of attempted statutory rape in the first degree and was sentenced to seven years on this charge. This time was ordered to be served consecutively with his other conviction. Statutory rape in the first degree, at the time of the conviction was an unclassified felony and its punishment was specified in the statute. Missouri statute contains no provision for attempted statutory rape in the first degree. The Court sentenced David Bullock to seven years for this charge. Pursuant to **R.S. Mo. §564.011**, the penalty for an "attempt" offense is as follows:

Unless otherwise provided, an attempt to commit an offense is a:

(1) Class B felony if the offense attempted is a class A felony.
(2) Class C felony if the offense attempted is a class B felony.
(3) Class D felony if the offense attempted is a class C felony.
(4) Class A misdemeanor if the offense attempted is a class D felony.
(5) Class C misdemeanor if the offense attempted is a misdemeanor of any degree.

R.S.Mo.§564.011 does not state what punishment applies to an attempt of an "unclassified felony." **R.S. Mo.§566.032,** which dealt with statutory rape did not, prior to June 5, 2006, provide for punishment for an "attempted statutory rape." Statutory rape in the first degree under **R.S. Mo.§566.032** is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten. Only after June 5, 2006 and after Petitioner had been convicted, sentenced and filed his Rule 29.15 motion did the legislature amend **R.S. Mo.§566.032** to include within the statute as an offense the "attempt" to commit statutory rape. The Missouri legislature, subsequent to the Petitioner's sentencing and the filing of his Motion to Vacate, Set Aside or

Correct the Judgement or Sentence recognized that attempted statutory rape in the first degree was not a recognized offense. Both the Missouri House of Representatives and the Missouri Senate introduced bills that would designate attempted statutory rape in the first degree as an offense. HB 1698 created the crime of attempting to commit statutory rape in the first degree and attempting to commit statutory sodomy in the first degree. Summary of Introduced Bill HB 1698– Sexual Offenders. Similarly, SB 588 proposed that **R.S. Mo. §566.032** be amended to include,

> "This section makes the penalty for attempt to commit statutory rape in the first degree a felony with an authorized term of imprisonment of not less than 5 years, unless certain aggravating circumstances exist, in which case, the term of imprisonment shall not be less than 10 years. This penalty is the same as the current penalty for committing statutory rape."

On June 5, 2006 the Missouri legislature amended **R.S. Mo. §566.032** to include the words "attempt to commit statutory rape in the first degree." Consequently, Petitioner Bullock was sentenced to a term of seven years under the pre-June 5, 2006 amended **R.S. Mo. §566.032** for attempted statutory rape when that statute did not make attempted statutory rape an offense.

The fact that Petitioner did not raise an objection to this sentence at the time of his sentencing does not in any manner defeat his jurisdictional

challenge. In *State v. Prell*, 35 S.W.3d 447 Mo. App. W.D. 2000) the defendant was sentenced whereby the trial court upgraded his class C felony of child molestation in the first degree to a class B felony. The court stated, "However, the failure of Mr. Prell to object during the trial or at the time of sentencing was immaterial because here the contention is that the sentence was not authorized by law. A defendant cannot by waiver confer jurisdiction on the court to impose a sentence not authorized by law. A sentence which is in excess of that authorized by law is beyond the jurisdiction of the sentencing court. *Merriweather v. Grandison*, 904 S.W.2d 485, 486 (Mo. App. W.D. 1993)." Such is precisely the situation here. Despite the fact that Petitioner did not object to his sentence at the trial level on the grounds that the trial court exceeded it's jurisdiction, the Petitioner was not and is not precluded from doing so at the appellate level of the proceedings since the sentence imposed by the trial court was not authorized by law. Appellant was not required to include this point within his 29.15 motion before the trial court in order for Missouri Court of Appeals and the Missouri Supreme Court or for this Court to address it. A defendant cannot by waiver confer jurisdiction on the court to impose a sentence not authorized by law. A sentence which is in excess of that authorized by law is beyond the jurisdiction of the sentencing court. *Merriweather v. Grandison*,_904 S.W.2d 485, 486 (Mo. App. W.D. 1993). Jurisdiction can be raised at any time and a judgment entered without jurisdiction can be collaterally attacked. *In the Interest of K.K.M.*, 647 S.W. 2d 886, 888 (Mo.App.1983). Appellant Bullock filed his 29.15 motion before the legislature amended **R.S.Mo. §566.032** so that the

statement by the Missouri Court of Appeals, Southern District, that he did not assert it in his 29.15 motion is not well taken not only because of lack of jurisdiction not being waived but the law had not yet been amended when he filed his 29.15 motion. The Appellant could not have legitimately raised it.

It is obvious that the Missouri legislature recognized that prior to June 5, 2006 there was no crime or punishment of attempted statutory rape and the legislature corrected this oversight in the statute and the law. However, it remains that at the time of Petitioner's conviction and sentencing and at the time of the filing of his Motion to Vacate, Set Aside or Correct the Judgement or Sentence, all prior to June 5, 2006, he was convicted and sentenced for a crime that did not statutorily exist in the State of Missouri. **R.S. Mo. §556.026** states that offenses must be defined by statute and that no conduct constitutes an offense unless made so by that code or other statute. Given this set of circumstances, clearly the trial court did not have jurisdiction to enter judgment and sentence against Appellant for the offense of attempted statutory rape in the first degree and Appellant's conviction and sentence must be vacated and his conviction set aside.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

SUSAN K. ROACH

Counsel for Petitioner
The Plaza in Clayton
190 Carondelet Plaza,
Suite 1500
Clayton, Missouri 63105
(314) 434-7272
Facsimile: (314) 863-6653
E Mail: SRoachlaw@aol.com

Dated: 2/27/07

SC88261
SD27491

IN THE SUPREME COURT OF MISSOURI

DAVID R. BULLOCK,

Appellant

vs.

STATE OF MISSOURI,

Respondent

Now at this day, on consideration of the appellant's application to transfer the above entitled cause from the Missouri Court of Appeals, Southern District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Thomas F. Simon, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the January Session, 2007, and on the 27th day of February, 2007, in the above-entitled cause.

Filed 1/10/07

No. 27491

MISSOURI COURT OF APPEALS

SOUTHERN DISTRICT

DAVID R. BULLOCK,

Movant-Appellant

vs.

STATE OF MISSOURI,

Defendant-Respondent

ORDER

Now on this 10th day of January, 2007, the Court, having fully considered Appellant's motion for rehearing or to transfer this cause to the Supreme Court of Missouri, does overrule said motion for rehearing and does deny said application for transfer.

No. 27491

COURT OF APPEALS OF MISSOURI, SOUTHERN DISTRICT, DIVISION ONE

DAVID R. BULLOCK,

Movant-Appellant

vs.

STATE OF MISSOURI,

Defendant-Respondent

December 20, 2006, Filed

COUNSEL: Appellant's attorney - Susan K. Roach, Melissa A. Featherston.

Respondent's attorney - Jeremiah W. (Jay) Nixon, Daniel N. McPherson.

JUDGES: JOHN E. PARRISH, Judge. Rahmeyer, P.J., and Scott, J., concur.

OPINION BY: JOHN E. PARRISH

OPINION: David R. Bullock (movant) was convicted, following a jury trial, of attempted statutory rape, §§ 564.011[1] and 566.032, and attempted sexual exploitation of a minor, §§ 564.011 and 573.023. *See State v. Bullock*, 153 S.W.3d 882 (Mo.App. 2005). Following his incarceration, movant filed a motion for post-conviction relief as permitted by Rule 29.15. The motion court

denied movant's motion after an evidentiary hearing. This court affirms in part, reverses in part, and remands.

The facts that led to movant's conviction are recited in *State v. Bullock, supra.* That opinion may be read in conjunction with this opinion for the purpose of ascertaining those facts. Facts will be stated in this opinion only as required to address the issues presented in this appeal.

Review of denial of relief under Rule 29.15 is limited to determining whether the motion court's findings and conclusions are clearly erroneous. *Worthington v. State,* 166 S.W.3d 566, 572 (Mo.banc 2005). The motion court's findings are presumed correct. *Black v. State,* 151 S.W.3d 49, 54 (Mo.banc 2004). The motion court's disposition will only be disturbed if, after a review of the entire record, the reviewing court is left with the definite impression that a mistake has been made. *Worthington,* 166 S.W.3d at 572.

Anderson v. State, 196 S.W.3d 28, 33 (Mo.banc 2006).

Movant's first point on appeal argues that "the ruling of the [motion] court of January 11, 2006"[2] was error; that "the [motion] court erred in finding that [movant's] counsel was not ineffective when he failed to request a psychological evaluation of the [movant]." Movant contends the trial court's finding that he was not denied effective assistance of counsel was "against the weight of the evidence and the law," but does not explain in summary fashion why, in the context of the case, the determination was against the weight of the evidence and the law as required by Rule 84.04(d)(1)(C).

"Deficient points relied on do not preserve issues for appellate review." *Bolz v. Hatfield,* 41 S.W.3d 566, 571 (Mo.App. 2001). However, notwithstanding non-compliance with Rule 84.04, appellate courts may exercise discretion and attempt to resolve issues on their merits unless the defective point impedes disposition of the case on its merits. *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo.banc 1997). A brief impedes disposition on the merits if it fails to give notice of the basis for the claimed error. *Id.*

The argument portion of movant's brief that addresses Point I includes the assertion that while the underlying criminal case was pending and movant was free on bond, he attempted suicide and was hospitalized. Following movant's hospitalization, his bond was revoked. He remained confined until his trial. Movant contends that in addition to having attempted suicide, he "repeatedly demonstrated in his police transcribed confessions an inability to distinguish fantasy from reality." He complains in the argument part of his brief that despite these situations, trial counsel never sought a psychological evaluation.

This court infers that this is the context of the case on which movant relies in contending in Point I that his trial counsel was ineffective. However, although this issue was raised in movant's Rule 29.15 motion and was the subject of testimony at movant's evidentiary hearing, the motion court did not address the factual assertions by defendant with respect to the basis for his claim that his trial attorney was ineffective in not requesting a mental evaluation as permitted by § 552.020.2. The motion court merely stated, as a finding of fact, that movant was not denied effective assistance

of counsel in violation of the Sixth and Fourteenth Amendments of the U.S. Constitution. There was no finding as to movant's mental state or whether, on the basis of the evidence adduced at the evidentiary hearing, movant's trial counsel was ineffective in not requesting a mental evaluation of movant.

Under Rule 29.15(j), a motion court is required to issue findings of fact and conclusions of law on all issues presented . . . . *Id; see Barry v. State*, 850 S.W.2d 348, 349-50 (Mo.banc 1993); *State v. Stanley*, 952 S.W.2d 327, 330 (Mo.App. 1997); *see also Crews v. State*, 7 S.W.3d 563, 568 (Mo.App. 1999) (discussion of exceptions to the general rule). "'There is no ambiguity is [sic] this directive and its requirements are not a mere formality.'" *Kelley v. State*, 988 S.W.2d 563, 564 (Mo.App. 1999) (quoting *State v. Deprow*, 937 S.W.2d 748, 751 (Mo.App. 1997)).

Smith v. State, 28 S.W.3d 889, 890 (Mo.App. 2000).

Point I is granted insofar as the trial court failed to address the issue presented. The case will be reversed and remanded with directions that the trial court make findings of fact and conclusions of law on the issue of movant's mental ability at the time of trial and whether movant's trial attorney was ineffective in failing to move for a mental evaluation.

Point II suffers from the same deficiency as Point I. It contends the trial court erred in not determining movant received ineffective assistance of counsel "for the reason that the trial court erred in finding that [movant's] [trial] counsel was ineffective when he failed to object to inadmissible, prejudicial evidence at trial

namely the computer generated printouts of electronic conversations between the [movant] and Officer Murray of the Diamond Police." Point II does not explain why, in the context of the case, the evidence of computer printouts of electronic conversations was inadmissible and prejudicial.

As with respect to Point I, this court has, albeit with some reluctance, pored through the argument portion of movant's brief to try to ascertain the issue to which Point II is directed. It appears the complaint is that trial counsel did not object to transcripts of instant e-mail messages between the investigating officer, posing as a young girl, and movant. Movant's trial attorney advised the court that he had no objection to the exhibit. Movant complains in his appellant's brief that the state did not "adduce any evidence as to chain of custody of the physical transcripts or the computer on which the transcripts were generated." As best this court can discern, that is the conduct to which Point II is directed.

The motion court found:

. . .

14. The State's evidence against [movant] included the computer generated printouts of electronic conversations between [movant] and Officer Jim Murray of the Diamond Police Department. Jim Murray testified that the transcripts were made by using the "cut and paste" function on his computer. The trial court properly admitted the evidence after a foundation for its admissibility was made.

15. Movant objected to trial counsel not having the computers used in the offense examined forensically.

16. Movant's counsel did not move for motion court to have the computers examined.

. . .

18. Movant's counsel failed to show that trial counsel's failure to have forensic examination of the computer prejudiced movant.

The motion court concluded that no prejudice was shown with respect to the alleged failing; that there was no reasonable probability that but for the actions movant claimed were errors, the result of the proceeding would have been different.

The mere failure to make objections does not constitute ineffective assistance of counsel. *Joiner v. State*, 621 S.W.2d 336, 338 (Mo.App.E.D. 1981). To justify relief on a postconviction motion, the failure to object must have been of such character as to deprive the defendant substantially of his right to a fair trial. *Schlup v. State*, 771 S.W.2d 895, 900 (Mo.App.W.D. 1989).

State v. Bearden, 926 S.W.2d 483, 486 (Mo.App. 1996).

Officer Murray testified at trial that he generated printouts of online conversations, or "chats," that he had with movant between September 24 and October 18, 2002. When the state first sought to use the transcripts at trial, movant's trial counsel objected on the basis of lack of foundation. The prosecuting attorney asked Officer Murray to read from the transcripts, at which

time movant's trial attorney objected that there was no record as to whether the transcripts were complete or how they were generated or whether they had been edited; that "those have to be laid as foundation before admission into evidence." Following the objection, the trial judge directed movant's trial counsel to "[l]ay a foundation."

Following the exchange between the attorneys and the trial judge, Officer Murray testified concerning the technique used to produce the transcripts of the chats; that the process resulted in preparation in their entirety, completely unedited; that "every word, every spelling, every punctuation, everything [was] exact." Officer Murray then read from the transcripts, they were offered, and upon movant's trial counsel advising the trial court that he had no objection, admitted into evidence.

Movant's trial counsel testified at the evidentiary hearing in this case. He explained that he did not object to the admission of the transcripts at trial; that he had the information about how the documents that were tendered in evidence were prepared from pretrial proceedings; that he made the strategic decision not to address the issue at trial. In addition to the verification of the transcripts of the conversations, movant's attorney pointed out that claims of movant about inaccuracies had been relatively minor. The motion court's finding that the transcripts of the conversations were properly admitted at movant's trial was not clearly erroneous. Counsel is not ineffective for failing to make nonmeritorious objections. *State v. Clay*, 975 S.W.2d 121, 135 (Mo.banc 1998), *cert. denied*, 525 U.S. 1085, 142 L. Ed. 2d 690, 119 S. Ct. 834 (1999).

To the extent that Point II may have been directed to a lack of forensic examination of Officer Murray's computer, the record before the motion court does not establish movant was prejudiced by that not having occurred. If it were determined movant's trial attorney was deficient, a determination this court does not make, there was no showing that movant was prejudiced by that inaction. Movant was not deprived of a fair trial by the lack of objection or the lack of forensic examinations about which he now complains. Point II is denied.

Movant's Point III claims that the motion court's denial of his Rule 29.15 motion "was against the weight of the evidence and the law . . . and was clearly erroneous for the reason that the trial court erred in finding that appellate counsel was not ineffective when he pursued inadequate avenue of defense, to-wit; entrapment." Point III does not explain in summary fashion why, in the context of the case, the determination of the motion court was against the weight of the evidence and the law as required by Rule 84.04(d)(1)(C). As with respect to Points I and II, this court's review of the argument portion of the brief causes it to believe that the issue, if it were properly before this court, could be addressed on its merits; that the complaint movant seeks to make is directed to the fact that movant, through his defense, did not deny his guilt; that, therefore, the premise that movant committed the acts claimed as a result of government conduct could not be sustained. *See State v. Bullock, supra*, at 887, where this court held that a defense of entrapment is not available when the defendant in a criminal trial does not admit he committed the crimes for which he was convicted and there is no evidence that he was not predisposed, ready and willing to commit the crime charged.

Although the issue of trial counsel's effectiveness in asserting a defense of entrapment was questioned in movant's Rule 29.15 motion and was addressed by testimony at the evidentiary hearing, the motion court did not address the issue in its findings of facts and conclusions of law. As previously noted, the directive that a motion court issue findings of fact and conclusions of law on all issues presented by a post-conviction motion is not a mere formality but a requirement. *Smith v. State, supra.* That requirement was not met in this case. Thus, reversal with respect to the issue presented by Point III and remand are required in order for the motion court to address the issue by appropriate findings of fact and conclusions of law.

Movant's Point IV is directed to the sentence he received for the offense of attempted statutory rape in the first degree. Point IV argues it was error to sentence movant to confinement for a term of seven years because "at the time of the alleged offense the statute contain[ed] no provision regarding punishment for attempted statutory rape and that as a result the law did not designate and there did not exist the crime of attempted statutory rape." Because movant did not assert this claim in his Rule 29.15 motion, he may not assert it on appeal. *Spears v. State*, 181 S.W.3d 239, 243 (Mo.App. 2005). Point IV is denied.

Point V claims the motion court erred in denying movant's Rule 29.15 motion "for the reason that the [motion] court erred in refusing to recuse itself despite the fact that the subject matter of the hearing was the effectiveness of counsel and counsel was former law partners with the judge presiding over the hearing."

Movant contends that the judge who conducted the hearing on his Rule 29.15 motion had been a law partner with movant's trial attorney more than 20 years before the evidentiary hearing on the motion. Movant's post-conviction counsel moved to recuse the judge at the outset of the evidentiary hearing. The motion court denied the request.

Movant's request to disqualify the judge came at the start of the evidentiary hearing. It was not timely for purposes of Rule 51.05, nor did it meet requirements of Rule 51.05 that it be in writing; neither was the request sufficient to constitute a basis for the motion court's disqualification for cause. The request was founded only on the motion court judge's acknowledged association with movant's trial attorney 20 years hence. The allegation did not constitute the type of relationship that would raise doubt or create an appearance of impropriety to a reasonable person. It was too attenuated to require disqualification. *Smulls v. State*, 10 S.W.3d 497, 501 (Mo.banc), *cert. denied*, 531 U.S. 881, 148 L. Ed. 2d 135, 121 S. Ct. 194 (2000). Further, in addition to not being in writing, the request was substantively insufficient. Thus, the motion court judge was not required to have a different judge hear the motion. *See State v. Tivis*, 948 S.W.2d 690, 700 (Mo.App. 1997). Point V is denied.

Point VI continues the failings with respect to the content of the point on appeal in that it asserts error in the motion court's ruling "for the reason that the trial court erred in finding that [movant's] counsel was not ineffective when he failed to pursue adequate avenues of defense" without stating "why, in the context of the case, those legal reasons support the claim of reversible

error" as required by Rule 84.04(d)(1)(C). Nevertheless, following a review of the record, this court concludes that no error of law appears with respect to claims attempted to be asserted in Point VI. Further discussion of Point VI would have no precedential value. Point VI is denied in compliance with Rule 84.16(b)(5).

The parts of the judgment that deny movant's claim of ineffective assistance of counsel based on allegations that movant's trial counsel did not request a psychological examination of movant and that movant's trial counsel pursued the alleged inadequate defense of entrapment are reversed for the reason that the motion court did not make findings of fact and conclusions of law as required by Rule 29.15 as to those issues. The case is remanded with directions that the motion court make findings of facts and conclusions of law as to those allegations. In all other respects the judgment is affirmed.

JOHN E. PARRISH, Judge

Rahmeyer, P.J., and Scott, J., concur

Footnotes

n1 References to statutes are to RSMo 2000.

n2 The motion court's Findings of Fact and Conclusions of Law and its Order denying movant's Rule 29.15 motion were filed January 11, 2006.

Filed 1/11/2006

05-88

IN THE CIRCUIT COURT OF JASPAR COUNTY, STATE OF MISSOURI

DAVID R. BULLOCK,

Movant

vs.

STATE OF MISSOURI,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Movant is currently confined in the Missouri Department of Corrections and is presently detained at Eastern Reception Diagnostic and Correctional Center in Bonne Terre, Missouri.

2. The Honorable Timothy W. Perige in the Circuit Court of Jasper County in Case Number 03CR-679889 imposed judgment upon Movant for the offenses of Attempted Statutory Rape 7 1st Degree and Attempted Sexual Exploitation of a Minor, after Movant was found guilty by jury on both counts.

3. Sentence and Judgment was entered on December 4, 2003, and Movant was sentenced to two consecutive

seven (7) year terms for a total of fourteen (14) Years.
4. Movant appealed from the judgment of conviction to the Missouri Court of Appeals.

5. Movant's convictions were affirmed and the mandate was issued on January 26, 2005.

6. This is the only motion that Movant has fled to vacate judgment under Missouri Supreme Court Rule 29.15.

7. At this time, there are no petitions filed in either state or federal court for habeas corpus related to this cause of action.

8. No petition has been filed in the United States Supreme Court for certiorari.

9. All issues raised by Movant in his Motion are not issues appropriately raised on direct appeal.

10. Movant was represented by Attorney C.R. Rhoades during the course of his trial proceedings, including pretrial motions, trial, and sentencing.

11. Movant was represented by Attorney Irene Karns during the course of his appeal to the Missouri Court of Appeals.

12. Movant is not currently under sentence from any other court.

13. Movant complains of appellate counsel's failure to object to appellate court's use of Exhibit 2. Court finds movant fails to show how movant was prejudiced by the submission of Exhibit 2.

14. The State's evidence against Defendant included the computer generated printouts of electronic conversations between Defendant and Officer Jim Murray of the Diamond Police Department. Jim Murray testified that the transcripts were made by using the "cut and paste" function on his computer. The trial court properly admitted the evidence after a foundation for its admissibility was made.

15. Movant objected to trial counsel not having the computers used in the offense examined forensically.

16. Movant's counsel did not move for motion court to have the computers examined.

17. Trial counsel is a very experienced criminal trial attorney with over 25 years trial experience and handling in excess of 100 jury trials.

18. Movant's counsel failed to show that trial counsel's failure to have forensic examination of the computer prejudiced movant.

19. The movant was not rendered ineffective assistance of counsel by his trial counsel, in violation of the Sixth and Fourteenth Amendments U.S.C. A. Cons. Amend. 6.14.

20. That movant was not rendered ineffeetive assistance of counsel by his appellate counsel, in violation of the Sixth and Fourteenth Amendments. U.S.C.A Cons. Amend.6.14.

CONCLUSION OF LAW

To prevail on a claim of ineffective assistance of counsel, a movant must show: First, that trial counsel failed to exercise the customary skill and diligence of a reasonable competent attorney under similar circumstances, and, second, that counsel's deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052,2064-65, 80 L.Ed.2d 674 (1984). This prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id At 694, 104 S.Ct. at 2068. In the present case no prejudice was shown.

ORDER

Wherefore, Court denies movant's motion to set aside or vacate as movant failed to meet its burden of proof.

Attempt.

564.011. 1. A person is guilty of attempt to commit an offense when, with the purpose of committing the offense, he does any act which is a substantial step towards the commission of the offense. A "substantial step" is conduct which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense.

2. It is no defense to a prosecution under this section that the offense attempted was, under the actual attendant circumstances, factually or legally impossible of commission, if such offense could have been committed had the attendant circumstances been as the actor believed them to be.

3. Unless otherwise provided, an attempt to commit an offense is a:

(1) Class B felony if the offense attempted is a class A felony.

(2) Class C felony if the offense attempted is a class B felony.

(3) Class D felony if the offense attempted is a class C felony.

(4) Class A misdemeanor if the offense attempted is a class D felony.

(5) Class C misdemeanor if the offense attempted is a misdemeanor of any degree.

Offenses must be defined by statute.

556.026. No conduct constitutes an offense unless made so by this code or by other applicable statute.

Statutory rape and attempt to commit, first degree, penalties.

566.032. 1. A person commits the crime of statutory rape in the first degree if he has sexual intercourse with another person who is less than fourteen years old.

2. Statutory rape in the first degree or an attempt to commit statutory rape in the first degree is a felony for which the authorized term of imprisonment is life imprisonment or a term of years not less than five years, unless in the course thereof the actor inflicts serious physical injury on any person, displays a deadly weapon or dangerous instrument in a threatening manner, subjects the victim to sexual intercourse or deviate sexual intercourse with more than one person, or the victim is less than twelve years of age in which case the authorized term of imprisonment is life imprisonment or a term of years not less than ten years.